



POLICE DEPARTMENT

March 6, 2009

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Kifah Othman
Tax Registry 930865
68 Precinct
Disciplinary Case No.: 83266/07

The above-named member of the Department appeared before me on October 27, 2008 and November 10, 2008, charged with the following:

1. Said Police Officer Kifah Othman, assigned to the 68th Precinct, on or about and between March 7, 2006 and May 1, 2006, while off-duty, did wrongfully and without just cause engage in off-duty employment as a Limo Driver, with Luxury Limo, without authority or permission to do so.

PG 205-40 – Page 1, Paragraph 1 – OFF DUTY EMPLOYMENT

The Department was represented by, Katie O'Connor, Esq., Department Advocate's Office, and the Respondent was represented by Michael Martinez, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Guilty as charged.

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SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Sergeant Christopher Connolly and Principal Administrative Associate Yolanda Caraballo as witnesses. Offered into evidence were two copies of one-page Departmental applications for off-duty employment, dated September 1, 2004, as Department's Exhibit ("DX") 1, and another dated May 1, 2006, as DX 2.

Sergeant Christopher Connolly

Connolly is assigned to the Brooklyn South Investigations Unit and has been so for the past three-and-a-half years. Sometime in 2006 or 2007, he received a case involving the Respondent which had been investigated by Lieutenant Kehoe, now retired and formerly of Connolly's command. Since Kehoe's retirement, Connolly has not discussed this case with him and said that upon receiving the case file, the investigation had already been completed.

Upon receiving the case, Connolly testified that he reviewed the paperwork in the file, including the Respondent's Official Department Interview and "put everything together from there and made my own conclusion." He said that the complaint concerned the Respondent's involvement in an off-duty automobile accident on March 7, 2006, with an individual named Mr. Caliboso. Both Caliboso and the Respondent were driving limousines. Connolly said that the two agreed to settle the damage to the Respondent's vehicle and "not generate any paperwork." Caliboso, however, complained to the Internal Affairs Bureau (IAB) that the Respondent "renege" on their agreement and telephoned his employer who subsequently fired Caliboso. Upon receiving Caliboso's

complaint, IAB conducted checks and determined that the Respondent was not authorized to be working off-duty as a limousine driver. Connolly said that there was no misconduct with respect to the accident itself, that it was "just a vehicle accident." The only misconduct substantiated in the investigation involved unauthorized off-duty employment, as the two authorizations that the Respondent had on file for off-duty employment concerned a 2004 request for work with a security firm, and a May 1, 2006 request for the limousine company.

When Caliboso called IAB, he provided the Respondent's name as "Keith Rothman." Connolly said that he probably misinterpreted the Respondent's name. Because there was no such person on file in the Department's records, IAB telephoned the limousine company, Luxury Limousine, which the Respondent was working for and determined his correct name. During his Official Department Interview, the Respondent admitted that he was working for the company and also said that he believed that he had authorization to do so. The investigation revealed that on the day of the accident, March 7, 2006, the Respondent was not authorized to work for Luxury Limousine. Other than the two aforementioned applications for off-duty employment, Connolly was not able to locate any other applications on file preceding the March 7 accident date.

In examining DX 1, Connolly testified that it was an off-duty employment application for May 1, 2006. It was signed by the Respondent's commanding officer on May 30, 2006, and approved on June 9, 2006. Upon inquiry from the Court, Connolly said that the most important date is the approval date, June 9 in this instance. He noted that it was his understanding that a member cannot engage in off-duty employment prior to the approval date despite whatever date the member may have submitted the

application. Connolly testified as to his understanding of the Patrol Guide requirements for off-duty employment. He said that a member of the Department must submit an application for each off-duty job, that you must renew the application on an annual basis, and that it has to be approved prior to commencing the job. Connolly said that the Respondent did not complete those steps prior to March 7, 2006.

Connolly testified that he discussed DX 1 with Principal Administrative Associate Yolanda Caraballo of the Employee Management Division ("EMD"). Specifically, he said that he spoke with her on the telephone and learned that the Respondent submitted the application in person. He noted that the application contained a number which is crossed out near where the document says "application change." Connolly said that Caraballo changed this and checked off "new application" because "it wasn't an application change, it was in fact a new application for off duty employment." He said that the initial number on the application which was crossed out was a number which corresponded with the Respondent's previous employment at the security company. After viewing DX 2, Connolly recognized it as another off-duty employment application for the Respondent, dated September 1, 2004, for Strategic Security Corporation. He said that the off-duty work number on this document was either "S-910" or "5910" and he said that this number was also on the application for Luxury Limousine, DX 1.

Upon inquiry from the Court, Connolly said that the fact that the two applications having the same number was a mistake. He explained that two applications would have the same numbers if they pertained to one job, as a continuation, a renewal, or to update information for an existing job. With respect to DX 1 and DX 2, Connolly testified that there was "almost" a two year gap between them and that "they are for different types of

employment altogether.” He was unsure of why the number from DX 2 was transferred onto DX 1, and reiterated it was not a continuation or a location change.

On continued direct examination, Connolly indicated that off-duty work numbers are assigned upon approval by EMD. He said that DX 1 contains a new off-duty work number, and that the number which is crossed out is the same number as what is listed on DX 2. Caraballo also confirmed this to Connolly when they spoke about the Respondent’s applications.

With respect to his investigation, Connolly testified that the Respondent was working off-duty by driving a limousine on March 7, 2006, without the requisite approval on file which resulted in the charge in this matter being substantiated against him. Aside from DX 1 and 2, Connolly was unable to locate any other applications for off-duty employment submitted by the Respondent.

After speaking with Caraballo, Connolly claimed that his decision about the case and the Respondent’s off-duty employment was not changed.

On cross-examination, Connolly indicated that the conversations that he had with Caraballo occurred a week prior to this trial. The investigation had initially been closed, he believed, around August of 2007. Connolly acknowledged that once an investigation is completed, it is forwarded to the Department Advocate’s Office for the drafting of charges and then returned to his command for approval. He indicated that his commanding officer, Captain Richard DiBlasio “signed off” on the investigation in September of 2007. Connolly agreed that he received the case after Kehoe retired and that Kehoe had completed the majority of the work for the investigation. Generally speaking, the last step in an investigation would be to conduct an Official Department

Interview of the Respondent, which was the case in this instance. Connolly became involved with this case subsequent to the Respondent's Official Department Interview. He agreed that he later learned that the case needed to be reopened when he received a phone call from the Assistant Department Advocate ("ADA") requesting that SPAA Remini be interviewed regarding off-duty employment records. Connolly said that he was surprised that he received a phone call from the ADA regarding this case and that she said that the "Department needed to know when this application was submitted to [Remini] and what date it was submitted to her, you know, what day did she send it to [EMD]."

Connolly spoke to Remini by telephone and he told her that he needed to know about the Respondent's off-duty employment application. While she had a recollection of it, she said that she would have to look through the precinct's records for specifics. Connolly later scheduled an Official Department Interview of Remini.

The ADA advised Connolly that he "should speak" to Caraballo about a week prior to this proceeding. This occurred after Remini's interview and consisted of Connolly "briefly" speaking to her on the telephone. He did not conduct an Official Department Interview of Caraballo nor did he tape his telephone conversation with her. He admitted that it was his decision to elect not to tape the telephone call. Connolly said that he did not do any paperwork or additional worksheets reflecting his communications with the ADA requesting that he take further steps in the case. He said that he may have prepared notes on a notepad but he did not do anything significant upon the reopening of the case.

With regard to the two off-duty employment applications in evidence as DX 1 and 2, Connolly said that Caraballo and the ADA noted that the off duty work “numbers didn’t correspond.” This discrepancy was not addressed during the initial investigation handled by Kehoe. With respect to this number discrepancy, Connolly said, “I don’t think it has too much bearing on the outcome of the case.”

Connolly reiterated that the investigation of the Respondent began with a complaint from an off-duty dispute. It was not something that rose to the level of something that would be investigated by IAB. He acknowledged that there was not “much of an allegation” to begin with here and that the complainant was displeased because the Respondent promised not to call his employer and did so anyway. Connolly said that is not police misconduct. He agreed that with respect to cases such as this, it is “pretty much an automatic” that a check would be performed to see if the Respondent’s off-duty employment was authorized. He testified that on the night Caliboso made his complaint to IAB, IAB did a check on the Respondent’s off-duty employment status. During the Respondent’s Official Department Interview, Connolly believed that Kehoe focused on the incident with the other limo driver and indicated that the Respondent believed that he had authorization to work off-duty. This was later disproved by Kehoe’s investigation.

Connolly agreed that the Department has a lot of “things” on file, and it was possible that paperwork might be misplaced. He acknowledged that he agreed with the case against the Respondent being substantiated, and indicated that it was substantiated because Kehoe’s investigation revealed that there was no application for off-duty

employment on file for the Respondent. Similarly, the case would have been unsubstantiated had the proper paperwork, predating the March 7 accident been on file.

After examining the charge against the Respondent, which contained the date "...on or about and between March 7, 2006 and May 1, 2006..." Connolly said that this date range was charged because the accident occurred on March 7 and the Respondent did not submit the proper form until May 1. He reiterated that submitting the paperwork does not grant approval, and that approval did not occur until June 9, 2006, according to DX 1. Connolly said that if the Respondent was involved in an accident on May 10, 2006, he did not believe that his off-duty employment would have been authorized. He then testified that he did not know why the time period charged encompassed the time up to when the Respondent submitted the application and reiterated that the May 1 submission would not have granted approval.

The Official Department Interview of Remini took place at the 68 Precinct. During the interview, she indicated that her memory of this case was vague because it had occurred over two years ago. Remini recalled calling Police Headquarters on behalf of the Respondent to inquire about his off-duty employment status. He could not recall if Remini said that she had been told that the Respondent's application was approved. She acknowledged that the Respondent asked her about the paperwork prior to May 1, however. Connolly recalled that Remini called Police Headquarters at the Respondent's request, a request that he made prior to May 1, 2006, the day that DX 1 was submitted. Notwithstanding her memory, Connolly agreed that Remini relayed that the Respondent was asking about his application before May 1.

Connolly acknowledged that he is familiar with Patrol Guide §205-40, which outlines the various steps that need to be completed in order to obtain approval for off-duty employment. Connolly testified that he believed that an officer is notified that the application has been approved upon receipt of the off-duty work number, which is generated by and written on the form by EMD. Connolly reiterated that the "5 or S-910" off duty work number on DX 1 which was subsequently crossed out belonged to the Respondent's previous employment which had lapsed by May 1. The Respondent was no longer performing the previous off-duty employment nor was he seeking authorization to do so. Connolly was not sure who wrote the wrong number on DX 1. He noted that Caraballo informed him that she believed the Respondent hand delivered DX 1 to EMD for approval and she found the wrong number on it. The investigation never revealed who put the incorrect number on DX 1, the Respondent's authorization request to work for the limousine company.

After reviewing the case, Connolly admitted that he decided that there was enough evidence to substantiate the off-duty employment charge against the Respondent. This was based on the fact that the Respondent did not have authorization for off duty employment on file on the day of the March 7, 2006 accident. The charge still would have been substantiated even in the event the application was submitted on March 1 because it still would have required approval. Connolly believed that the work number is generated by EMD upon approval.

Upon examination by the Court, Connolly said that the work number on the May 1 application is 697, and that this represents the Respondent's new authorization number.

Connolly was unsure when in the approval process the work number is generated. Nor was he aware if applications that were disapproved were assigned numbers as well. He indicated that the numbers were not generated on the precinct level. Connolly was unsure of who typed the Respondent's form and could not recall if Remini said that she typed it based upon a handwritten draft. The form is required to be typed.

On continued questioning regarding DX 1, Connolly said that this application was eventually approved on June 9, 2006. He was unsure of whose signature appeared on the bottom of the document signifying the approved status. Connolly agreed that the first step for obtaining authorization is the commanding officer's approval, and it is then subsequently forwarded to Police Headquarters for further processing. He reiterated that the Respondent was authorized to work the off-duty limousine job on June 9.

If the Respondent had been involved in an incident relating to his employment between the day it was approved and the date that he received the approved application back from EMD via Departmental mail, Connolly felt that the Respondent would be covered. He agreed that if the Respondent telephoned Police Headquarters and learned that his application was approved, it would have been okay to work without having received the physical application back. Connolly was unsure if the application was a triplicate or quadruplicate form but said that it was carbonless and that the Patrol Guide required all copies be submitted for approval.

Principal Administrative Associate Yolanda Caraballo

Caraballo has been employed by the Department for 18 years and works within the Employee Management Division's Personnel Records Unit. Her duties include

processing off-duty employment applications, planning retirement ceremonies and handling legal requests. She also performs supervisory functions.

With respect to her duties in processing off-duty employment applications, Caraballo said that she reviews them for accuracy. In the event they are incomplete, they are returned to the respective command. Properly completed applications are logged. Those applications that are security related are forwarded to the Intelligence Division for records checks while the remaining applications are entered into "the computer." Caraballo said that she waits until she has a "batch" of applications to give to Administrative Manager Catherine McCann to sign. She explained that she waits until she has gathered "a few" applications for McCann's approval because it would be "ridiculous" to give to her one at a time.

Caraballo knew that the Patrol Guide section addressing off-duty employment was §205-40 and she explained her understanding of the procedure. She testified that an application must be submitted annually, for each employer and for each location. A renewal application must be submitted ten days before expiration. She added that applications are submitted through commands and are forwarded to EMD for final determination. The application is then forwarded back to the command. In detailing the procedure for processing applications, Caraballo testified that she reviews the application and ensures that both the applicant and their commanding officer have signed it. If it is a security related application, she ensures that it has been signed by the borough commander. She checks to make sure that every section has been properly completed and inputs the information into the computer. The application is considered approved in "the end when it's all ready. When everything has been reviewed and put in the

application and [McCann] signs off on them, they have been approved.” McCann signs each application that comes into EMD.

An off-duty work number is assigned to the application upon being logged into the log book, at the beginning of the process when it arrives at the office. The number is an identification number and not an approval number. This numbering occurs before McCann signs the application. Caraballo said that she tells applicants to call her “usually...within two days” for this number and she noted that a command is supposed to furnish the applicant with a copy of the approved application. It was reiterated that the number is never assigned before the application arrives at EMD, and the number assignment occurs after it arrives at Caraballo’s office. Caraballo explained that the number is assigned sequentially, via a log book.

Caraballo recognized DX 1 as a photocopy of an off-duty employment application. She knew that she had seen it before but could not recall when due to the volume of applications that she handles. Caraballo testified that her initials were on the top of DX 1, signifying that she changed the application from an “application change to new application.” She explained that this change was made because the application was, in fact, a new application and not a change. Caraballo said that when applications arrive at her office, she checks a database to determine what type of application is being filed. She indicated that she only initials the applications when she has to make a change. DX 1 arrived at Caraballo’s office in person and was initially marked as an “application change.” On inquiry from the Court, Caraballo explained that an “application change” designates a change or update to an existing application already on file. This was not the case for the application that the Respondent was filing.

Upon examination by the Court, Caraballo reiterated that when she first received the DX 1 application, it referred to a prior application filed by the Respondent. She checked the Respondent's tax registry number against a database and learned that there was "no record." Accordingly, she said, the application could not have been an "application change." Rather, it was a new application and she designated the form as such. Had the application been a change, the database would have reflected that the Respondent had an existing off-duty application and employer on file.

Caraballo identified May 1, 2006 as the date of the application for DX 1. She said that the off-duty work number on the document is "697" and that she is the person who manually writes in these numbers. She also identified her handwriting. With respect to the "typed in" and crossed out off-duty work number on the application, Caraballo said that she crossed it out because the number pertained to a previous application filed by the Respondent which related to a security position. She identified DX 2 as this application, which was a new application for "Strategic Security Corporation." The work number on this application was "S-910." In re-examining DX 1, Caraballo said that the work number that she crossed out was also "S-910." She indicated that using the number from DX 2 for DX 1 was not the proper procedure. DX 2 was dated December 7, 2004, and Caraballo said that each approved application is valid for one year, and so, this application expired December 7, 2005.

On the bottom of DX 1, Caraballo identified McCann's signature and said it was dated June 9, 2006. This signified the approval date for this application. Caraballo said that she was not able to find any other off-duty applications on file for the Respondent aside from the two in evidence as DX 1 and 2. Nor did she find any other applications

for "Luxury Limousine" on file. Caraballo testified that based on her review of DX 1, the Respondent was not authorized to be working off-duty on March 7, 2006.

On cross-examination, Caraballo agreed that she was the only person who handled off-duty employment applications within the Department. She said that she places her initials on the applications in instances where she has to make changes, and said that she has the authority to make these minor changes. Caraballo uses her initials to signify that she made a change to an application. She disputed that she was the only person who can make changes on applications, claiming that other people handle the application before she receives it. She reiterated that she was the one that changed DX 1, the May 1 application, from an application change to a new application and she was sure that she was the person who crossed off the "S-910" work number on this application as well. This number was on the application before it arrived at the EMD office.

On questioning about DX 1, Caraballo said that the "697" off-duty work number was filled in on June 9, 2006. This was also the same day that it was approved by McCann. She said that she knew that the numbering and the approval occurred on the same day because both the received "in person" date and the approved date are the same. Caraballo said that she would not have had the application prior to June 9. She said that applications are either "left on my desk" or given to her in person. Upon receiving the application, she claimed that she would have determined that it was a new application and made the appropriate change to the work number on top, followed by submitting it for approval. Caraballo said that 30 percent of applications contain mistakes or omissions. She also said "50 percent of the time half of them are sent back" as a result of

missing information. The error on the Respondent's application with respect to the work number was minor and thus, able to be corrected by Caraballo on her own.

Annually, Caraballo processes about 2,000 to 2,500 applications for off-duty employment. Regarding the Respondent's application, she said that she was contacted by the Department Advocate's Office about a month ago when she provided an affidavit. In general, she said, she can not recall individual applications with specificity. Nor did she have an independent recollection of the Respondent's application or of seeing him at the EMD office. Caraballo was unable to estimate how many applications are dropped off in person at EMD. She agreed that "in person" does not necessarily mean that the applicant dropped it off personally, as the application could have been delivered via messenger. Caraballo agreed that she was contacted by some investigative group regarding the Respondent's application. Regarding the affidavit that she signed, she admitted that she signed it two to three weeks before trial and that it was prepared after she had a conversation with the ADA. She agreed that this affidavit reflected that an IAB investigator contacted EMD in May of 2006 to determine if the Respondent had authorization to work off-duty on March 7, 2006. When asked how she was sure that IAB contacted her in May of 2006, Caraballo said, "I recollected, but I can't swear to it since I get so many calls and it's been a couple of years." She denied that someone made a representation to her that IAB called her in May of 2006.

On further questioning regarding the affidavit that she signed, Caraballo said that she believed that it should have said "around May" and not specifically May of 2006. Accordingly, she agreed that she could have been called by an investigator about the Respondent before May of 2006. She did not document the telephone call in a log. She

agreed that the application, DX 1 itself, is more reliable than the phone call from IAB because her initials and the dating on the face of the document reflect when she worked on it. Caraballo agreed that she receives “a lot” of calls from IAB, investigatory units, and applicants themselves.

Caraballo agreed that when an individual submits an off-duty employment application, they need a second job. Additionally, it also means that they have a job and need approval to work, as the application itself requires a specific job be listed. It is not permissible to submit a generic application. Caraballo reiterated that she receives a large number of phone calls and said it would be “impossible” to log all of the calls. She did not recall anyone calling her on behalf of the Respondent, although she said that she receives these calls often. Caraballo said that it is “rare” for a PAA to call regarding the status of an application and that calls are generally from IAB, investigative units, or applicants themselves. She was unable to recall the Respondent calling himself or anyone on his behalf.

Regarding the processing of the applications, Caraballo reiterated that an application is assigned an off-duty work number. She said that the numbers are not reused, and that each year, the application gets a new number. With respect to updating applications, regardless of whether or not it was submitted on time or late, a new number would be generated anyway. In the event an individual had approval for off-duty employment, and that approval lapsed by a month, Caraballo said that the subsequent application would be considered a new application. Regarding renewal applications, she said that mistakes are common but characterized the applicants as being “misinformed,

absent minded.” Applications are supposed to be renewed ten days prior to the expiration date.

DX 1 was dated May 1, 2006 and was delivered to EMD on June 9, 2006. She was unable to say if the application remained at the 68 Precinct from May 1 to June 9, but noted that the Respondent’s commanding officer signed the form on May 30. Caraballo said after a commanding officer signs an application, “half the time” it is forwarded to Police Headquarters and the other half it is hand delivered via messenger or the applicant. Caraballo said that on occasion, a commanding officer returns the signed application to an applicant so that he may deliver it to Police Headquarters. She specified that the Patrol Guide allows commanding officers discretion as to how the application is transmitted to EMD. Aside from the Respondent’s commanding officer’s signature and date on the bottom of DX 1, there is nothing indicating when the commanding officer received the application.

Caraballo reiterated that she does not remember Remini or anyone else calling her to check on the status of the Respondent’s application. She said that had an application been approved and signed by McCann, she could have informed a caller that the application was approved. It is not her practice to telephone applicants to inform them of their application status, rather, approved applications are rerouted back to the applicant’s command. She admitted that there have been instances where applications are approved and the applicant does not receive the application back from EMD. Caraballo said that this is not due to faulty Department mail, rather, she said “they (the applicant’s command) just don’t tell them.” She noted that it is a rarity for an application to be

disapproved and the Respondent's request to drive a limousine off-duty is not something that would have ordinarily been disapproved.

An approval to work off-duty is in effect upon an application being signed by McCann. Regarding the Respondent's application, DX 1, approval was in effect as of June 9, 2006, and Caraballo said that this was the earliest date that the Respondent could have begun working the limousine job.

Caraballo explained that an application designated as an "application change" could mean that an officer changes commands, addresses, employer's duties or their hours. She said if it is the same type of job but for a different company, a new application would need to be filed. She reiterated, again, that "[e]very time a new application comes in, whether it's new or not, it gets a new number." She said that applications will "always have a number unless it's new." In the event of a renewal, the applicant is supposed to insert the old number in the section of the new form labeled "list all current outside employment approvals you wish to continue..." The top portion of the form is supposed to be blank. When she received DX 1, based on the fact that a number was listed in that location, Caraballo crossed it out. She did not know who filled that number in, and agreed that there was "no situation" where it would have been appropriate to have filled that box in with a number.

On redirect examination, Caraballo identified her handwriting on DX 1, near where it was checked "in person, 6/9/06." She agreed that she checks the respective box and writes the date at this location. She reiterated that the application is only approved when it is signed by McCann at the bottom.

Upon receiving a call inquiring about the status of an application, Caraballo said that she performs a check of a computer database to determine if it is approved, still pending, or was never received at EMD. The database can be searched by name, tax number, employer, employer's address, work location or command. When asked if IAB were to call with an inquiry, Caraballo testified that she would query the respective tax number to find out if there is a match, or no record. She said that if an application is pending, there would be no record.

The Respondent's Case

The Respondent called Senior Police Administrative Associate Susan Remini as a witness and testified in his own behalf.

Senior Police Administrative Associate Susan Remini

Remini has been employed by the Department for about 13 years and is presently assigned to the Military and Extended Leave Desk ("MELD"). Prior to August of 2008, she worked at the 68 Precinct as "captain's clerical" for the entirety of her career.

In her duties as captain's clerical, Remini prepared assorted paperwork needed by the precinct's captain. This included the processing of off-duty employment paperwork. She testified that upon receiving off-duty employment applications, "I would type them, sometimes the officers would type them themselves, give them to the ICO to review the case or any problems that they have in the past, then give it to the CO for signature and approval. Then it would be forwarded to the EMD." The completed applications went to EMD via department mail and Remini said that she was "guessing" that from the time

that she received an application to the time it went to Police Headquarters, it took two to three weeks. In detailing the work that she performed on the applications, Remini said that if she were to receive an application on Monday, for example, if everything was returned in time, the application would be further processed on Tuesday "by the latest." Depending on the availability of the precinct's commanding officer and the research that an application entails, it could take an additional week or two.

Remini said that some officers submitted typed applications to her, while others would handwrite a draft copy and ask her to type it for them. She said that if she received a typed application, she reviewed it to ensure that it was complete and it would then be forwarded to the precinct's ICO for review and then returned to her for submission to the commanding officer. She agreed that she was familiar with the nuances of the application from her years of experience in processing them and she was aware of the types of errors that would result in an application being rejected. She did not forward incomplete or inaccurate applications. With respect to the off-duty work number of the application, Remini said that she did not have any responsibility for that portion of the form. She testified that she made sure that the applicant "got a copy of the returned paperwork with the number on it because that's how it is processed." She said that this occurs after the application has been processed by EMD as approved or disapproved. Remini said that the off-duty work number would not usually be on the application "unless they are renewal and we have it available..." She claimed that if it was a renewal the "officer would probably look it up or we would look at prior paperwork together and then fill it in" to determine what the number was.

Remini recalled making calls on behalf of the Respondent concerning the status of an application that he had submitted. She believed that she made the calls in "March or April. End of March, beginning of April." She said she had one conversation with Caraballo at the Respondent's request because there had been no response regarding an application that he had previously submitted to EMD. Remini was confident that the paperwork had already been sent to Police Headquarters when she made the call to Caraballo and said that this was the "first and only" instance where she has made such a call on behalf of someone. Remini was unable to say how much time had passed between the time the application was sent to EMD and her phone call to Caraballo, stating:

I really can't give a good complete answer on that, but I would say if it was submitted in March, due to the fact that I know I made the phone call at the end of March or the beginning of April, it had to be submitted prior to that...

She said that it would usually take two or three weeks for the approved application to be returned to the precinct by EMD. Remini testified that she probably would not have made a phone call to EMD if it was within that usual two to three week waiting period. The Respondent asked about the status of his application on at least two occasions—it was not until the second occasion that Remini made the phone call to EMD.

With respect to the phone call to EMD, Remini claimed that she "pretty much" recalled it. She testified that she called and asked about the Respondent's application and was informed by Caraballo that she "didn't receive it, but to resubmit and that he would be approved because she had found, I believe, one from the year prior. So she used the same number, I believe. I am guessing that part." Remini also said that during the phone

call, Caraballo said that the Respondent was approved to work and said "...tell him he's approved and resubmit the paperwork and I will send you the final copy as soon as I can via Department mail." She said that it was her understanding that the Respondent was approved to work off-duty at that moment. Remini testified that the paperwork was resubmitted "right after the phone call" and that it was "...two or three days by the time everything got out and back and he was good." In response to the Court, Remini said that she was told that the Respondent *was* (emphasis added) approved, not that he would be approved.

While the Respondent was not on the telephone with Remini, he was standing in front of her when she made the call. She informed him that he was approved and stated, "I would never tell him he was (approved) if that's not what I was told."

On cross examination, Remini recalled that she testified she would type applications on behalf of officers on occasion. She recalled doing so for the Respondent on the day that EMD told her to resubmit the application and also, she believed, the application prior. She said that she has rapport with certain officers, including the Respondent, and they are comfortable asking her to type their paperwork.

Remini recalled an Official Department Interview on October 9, 2008, at the 68 Precinct. She remembered being questioned about the timing of when she called EMD on behalf of the Respondent and believed she said it was March or April. After reviewing the transcript of the interview, Remini recalled saying it was April of 2006, and not sometime in March.

When shown DX 1, Remini recognized it as an off-duty employment application for the Respondent. She admitted to typing the document and "guess[ed]" that she dated

it May 1, 2006 and entered the off-duty work number which was later crossed out.

Remini said that she took notes relating to her conversation with Caraballo, but could not find them for trial. She took the notes on her personal copy of DX 1, stored it in a yearly file, and was unable to find that file. She last saw the notes about a year ago when the Respondent needed a copy "for some kind of an appointment." Remini said that she was sure that the Respondent asked her about the status of his application in April of 2006 "until I read the date on this application (DX 1)." The Respondent never mentioned that he was involved in a car accident.

When Remini saw that the approval date of DX 1 was June 9, 2006, she said, "Okay. Wow." When asked if she had seen any applications for the Respondent aside from DX 1 for the limousine job, she said that she believed that she had done one previously, which would explain the number atop the application, but testified that she was "unable to locate" this application. Upon being shown DX 2, Remini said that it explained why she placed the number on top of DX 1. She testified, "...that's why that number would be placed on the top of the other application." It was her understanding that the number on DX 2 was filled in by EMD because it was a "first application" and the number on DX 1 was typed in because Remini already had the number. She believed that she retrieved the number from DX 2, and that it was not the case that the Respondent gave her the number.

Remini testified that she keeps copies of the off-duty applications in a file in a drawer. She claimed that she would not have looked for any additional applications for the Respondent beyond the one which would precede the new one.

On examination by the Court, Remini said she was not sure of the exact number of applications she completed for the Respondent but knew it to be "at least three because there was one in between [DX 1 and 2]." She reiterated that she could not locate the application in between and did not recall the date it was prepared.

On continued cross examination, Remini testified that the application which was between DX 1 and 2 had to have been completed prior to May 1, 2006, the date of DX 1.

The Respondent

The Respondent has been a member of the Department for six years. He testified that he first sought permission for off-duty employment in approximately 2004 for a position at a security firm, a job that he worked for eight months. In order to get proper authorization to work that job, the Respondent said that he inquired from other members of the Department as to the procedure and the application that needed to be completed. The Respondent testified that Remini typed the application for him.

With respect to the first time that the Respondent sought off-duty employment, the security position in 2004, he said that he received notice that he was approved through Department mail. Specifically, he received the returned application. The Respondent worked this job for eight months and never renewed the application. He testified that around the end of January to the beginning of February of 2006, he sought approval to work off-duty again, this time for a position as a limousine driver. He explained that a friend had told him about the job and he met with the employer and completed paperwork and classes. The employer offered him the position and he told them that he needed to first get approval from the Department. He noted that this

occurred at the end of January of 2006. The Respondent said he prepared a handwritten off-duty employment application, gave it to Remini, and asked her to type it for him. He said this occurred at the beginning of February of 2006.

The Respondent testified that it was his understanding that he could begin the limo position as soon as he was approved. Based upon his prior experience in requesting off-duty employment authorization in 2004, he said that he knew he would be approved "as soon as we got it back from One Police Plaza, captain's clerical. You received it, you are approved." After filling out the application in February, the Respondent said that he asked Remini about the status because no response had been forthcoming. He said "We called Police Plaza, and she said, oh, you're approved to work." In response to the Court, the Respondent clarified that it was Remini who made the phone call and he was unsure of who she spoke to. The Respondent said it was Remini who relayed to him that he was approved to work.

When Remini made the phone call to Police Headquarters and told the Respondent that he was approved, he said that this was the first instance where he asked her about the status of his application. He reiterated that Remini told him "[b]asically, she said I was approved." He claimed that this occurred at some point at the end of February, in Remini's office at the 68 Precinct. The phone call took place in front of him and the Respondent said that he was able to hear it. While the Respondent was aware that Remini was calling EMD, he was not sure who she spoke to.

The Respondent thereafter told the limousine company that he was able to work and began at the beginning of March of 2006. He said that he worked two to three times a week. The Respondent never received the approval in Department mail and so, he said

he approached Remini a second time, a few weeks after he began the job. He testified, “[s]he called I think the end of February, April. I don’t recall exactly the day...told me I was approved again, but I had to resubmit a new application.” He said that it was his understanding that he was approved to work but that EMD “didn’t have the prior [application].” The Respondent submitted another application.

Regarding DX 1, the Respondent testified that it was not the first application that he completed for the limousine position. He said that the May 1 date was when he went to Remini and asked her to complete it. He reiterated that he previously filed an application prior to May 1 for the same job, at the end of January to early February. The Respondent said that it was his understanding that he was already approved to work the limousine job when he completed the May 1 application, as he claimed that he was told of his approval by Remini at the end of February. The Respondent said that he submitted DX 1 and received it back with a June 9, 2006 approval date. He agreed that he began working for the limo company in early March of 2006 and never worked for the company before being informed that he had authorization. The Respondent reiterated, again, that Remini told him he was authorized to work after a conversation with EMD.

The Respondent stated that he is no longer approved for the limousine position; he stopped working the job and as a result, did not renew the application. He said that the Department never barred him or revoked authorization for him to work off-duty.

The Respondent admitted that the Department questioned him about a car accident which occurred while he was working off-duty. He testified that while he was parked, a vehicle reversed into him. There was no disciplinary action as a result of this incident, nor were there any accusations of wrongdoing. The Respondent said that this

accident occurred on March 7, 2006, and he believed that he had approval to work off-duty on this day.

On cross-examination, the Respondent said that he had no other proof other than “verbal proof” that he was approved to work as of February of 2006. He did not have a copy of this application and agreed that while the application has five copies to it, said that an applicant does not get a copy until after EMD processes it and forwards the copy back to the applicant. The Respondent said that this never occurred, despite submitting it at the end of January to early February. He was unsure when his commanding officer signed the application and does not know what happened to it after it was submitted. The Respondent reiterated that this application was typed by Remini.

The Respondent agreed that he was involved in a car accident on March 7, 2006, with an individual who became aware that he was a member of the Department. He said that he did not believe there would be any investigation arising from the accident because he did nothing wrong. About a year and a half after the accident, the Respondent was contacted by “[i]nspections” regarding the accident.

The Respondent said that he did not call EMD himself to check on the application, nor did he go to Police Headquarters. He took no other steps to determine if he was approved to work the limousine job in February of 2006. The Respondent also did not speak to his commanding officer about the issue. When shown DX 1, the Respondent recognized it as an off-duty employment application for him, dated May 1, 2006, with a June 9, 2006 approval. He also identified his signature on the application and acknowledged reading a statement on the application certifying that he understood

the “conditions of additional employment and shall abide by the guidelines of the Police Commissioner.”

The Respondent personally dropped off DX 1 on the 10th floor of Police Headquarters, at EMD. He was not sure if he did this on June 9, 2006 and did not recall who he gave it to. Upon giving Remini the handwritten draft copy of the application to be typed, the Respondent said that he did not include an off-duty work number. He made no changes after his commanding officer signed it and he did not review it.

After Remini told him that he was approved to work, the Respondent said he did not follow up because he was told that an approval would be coming in the mail. He said that he asked again about the approval in March or April, after already beginning the job, and was told that he had to resubmit another application. When asked, “And after you walked this (DX 1) down to [EMD], how did you learn that you had approval for Luxury Limousine and Transportation?” the Respondent replied, “I already had approval. I thought I was bringing down another application. I had approval back in February, and I was told by [Remini] that I needed to bring another application down, that I was still approved, but they misplaced my application...” In June of 2006, the Respondent said that he submitted the application and left. He has never seen Caraballo before.

FINDINGS AND ANALYSIS

The sole specification in this case alleges that the Respondent engaged in off-duty employment without having obtained authorization from the Department to do so.

It is not disputed that the Respondent was driving a limousine on March 7, 2006, while working off-duty for a company called “Luxury Limousine.” It is also not disputed

that the Respondent, while working as a limousine driver, was involved in a minor motor vehicle accident on that day with a vehicle driven by Mr. Caliboso. While no misconduct stemmed from this accident, it was this event that caused the Department and the Respondent, as he argues, to learn that he was not approved to be working off-duty as a limousine driver.

The Respondent has argued that on March 7, 2006, he believed that he had approval to work off-duty. He claimed that after being offered a position driving a limo, he drafted a handwritten off-duty employment application sometime at the end of January or the beginning of February. He gave the handwritten application to Remini to be typed. Remini testified that after typing the application, she forwarded it to her commanding officer for approval. Thereafter, it was sent via Department mail to EMD for further processing. No response was forthcoming from EMD regarding the application, and the Respondent claimed that he went to Remini to ask about it. At this point, Remini and the Respondent's testimony diverged.

Remini claimed that she made one telephone call to EMD on the Respondent's behalf, in "March or April. End of March, beginning of April," and that it was the "first and only" time she has ever done so for someone and "pretty much" recalled it. She claimed that the Respondent asked her about his application on at least two occasions and it was not until his second inquiry when she called EMD. Remini claimed that Caraballo told her, "...tell [the Respondent] he's approved and resubmit the paperwork and I will send you the final copy as soon as I can via Department mail."

Conversely, the Respondent's testimony was that when he asked Remini about his application, it was the first time he asked her, and that she called EMD at that point. He

said that Remini told him that he was “[b]asically...approved.” He testified that this happened at the end of February. When the Respondent never received a copy of his approval from EMD, he said that he went to Remini again, after beginning the limo job. He testified, “[s]he called I think the end of February, April. I don’t recall exactly the day...told me I was approved again, but I had to submit a new application.” Clearly, Remini and the Respondent’s versions of the events differ. This Court may never know exactly what transpired between the Respondent and Remini. That, however, is not the issue before this Court. The issue is whether the Respondent had approval for off-duty employment on March 7, 2006 through May 1, 2006.

Caraballo, who works in EMD, is responsible for processing all applications for off-duty employment within the Department. She testified, *inter alia*, as to the procedures that need to be taken in order for a member of the Department to obtain off-duty employment authorization. These procedures are delineated in Patrol Guide §205-40 and require a member to complete an application on an annual basis, for each employer and for each location. After an application is approved by an applicant’s commanding officer, it is forwarded to EMD and then back to the applicant’s command. Caraballo said that she personally reviews each application, enters it into a log book and a computer database, and submits it to her supervisor for final approval. All of this must occur *prior* (emphasis added) to the applicant engaging in off-duty employment. A copy of the approved application is ultimately forwarded back to the applicant to signify that they are approved.

The Respondent and Remini were positive that they sent an application to EMD sometime in January or February of 2006. Both also testified that Remini was told by

EMD over the telephone that the Respondent was approved but had to send another application in. Aside from the fact that this differs from the policy in the Patrol Guide, there was no evidence presented at trial that this application even existed. In fact, the only two applications in evidence were DX 1, approved June 9, 2006, and DX 2, for an unrelated security position from 2004. It makes little sense to this Court that the Respondent's off-duty employment status would have been approved without having a current application on file.

The Respondent's own testimony suggested that he was familiar with the procedures for approval. Indeed, he was aware that the application had to be received back from EMD and that this indicated that the request to work off-duty had been approved. Furthermore, this was not the first time that the Respondent had sought permission to work off-duty.

While this was perhaps a misunderstanding, it does not change the fact that the Respondent worked on March 7, 2006 as a limousine driver without permission. It was the Respondent's responsibility and not that of Remini, Caraballo, EMD or the Department to ensure that he had approval to work.

Accordingly, I find the Respondent guilty as charged.

PENALTY

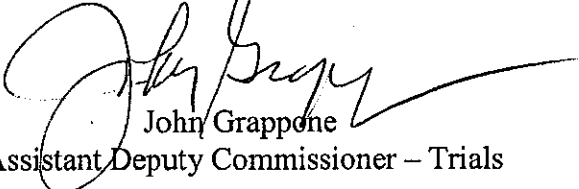
In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974).

The Respondent was appointed to the Department on June 27, 2003. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

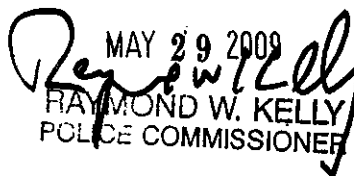
The Respondent has been found guilty of working off-duty as a limousine driver without having the proper authorization to do so. The Department has requested a penalty of a forfeiture of ten vacation days. In Disciplinary Case No. 81852/06, a four-year member with no disciplinary history forfeited ten vacation days for working off-duty as a disc jockey without authorization. Considering the Respondent's lack of a disciplinary history, combined with the fact that there is no evidence that he was intentionally attempting to conceal information from the Department, I find this to be an appropriate penalty.

Accordingly, this Court recommends that the Respondent forfeit ten vacation days.

Respectfully Submitted,


John Grappone
Assistant Deputy Commissioner – Trials

APPROVED


MAY 29 2009
RAYMOND W. KELLY
POLICE COMMISSIONER